Supreme Court, U.S.
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No. 91-2081

In the Supreme Court of the United States of America

October Term, 1991

GEORGIA POWER COMPANY,

Petitioner,

v.

PATAULA ELECTRIC MEMBERSHIP CORPORATION and FLINT ELECTRIC MEMBERSHIP CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

GEORGIA POWER COMPANY'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

TROUTMAN SANDERS
5200 NationsBank Plaza
600 Peachtree Street, N.E.
Atlanta, Georgia 30308-2216
(404) 885-3000

Ralph H. Greil
Counsel of Record
Robert P. Edwards, Jr.
Kevin C. Greene
Susan P. Wilkerson
Eric A. Szweda
Counsel for Petitioner Georgia Power Company

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GEORGIA POWER COMPANY'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

This reply will address *seriatim* the contentions raised in Respondents' Brief in Opposition with respect to Georgia Power Company's (hereinafter "Georgia Power") Petition for Writ of Certiorari (hereinafter "Petition").

I.

This Court Should Exercise Its Discretion And Grant Certiorari To Review The Decision Below.

Respondents' contention that this Court should deny certiorari because no final decree has been issued and therefore the Court should be "relieved from addressing important constitutional questions" is without merit. [See Respondents' Brief in Opposition, at 8.] The present action was properly in the Eleventh Circuit on Respondents' appeal from the district court's grant of Georgia Power Company's and the State Defendants' motions to dismiss. Thus, this Court has jurisdiction to issue certiorari pursuant to 28 U.S.C. § 1254(1). *See, e.g., Nixon v. Fitzgerald*, 457 U.S. 731 (1982). Further, this case presents the elements that are paramount to this Court's consideration of petitions for certiorari. The United States Court of Appeals for the Eleventh Circuit issued a decision that is in conflict with the decisions of other United States Courts of Appeals and decided an important question of federal law that has not been, but should be, settled by this Court. [See discussion at pages 3 and 4 of this Reply Brief.] Contrary to Respondents' assertion, resolving the conflict between the circuit courts illustrated by the Eleventh Circuit's decision will promote judicial efficiency and economy by resolving an issue of widespread public importance. Because the issues impli-

cated in this case have been fully analyzed by the lower federal courts, there is no benefit to postponing consideration of the essential question presented. Therefore, this Court should exercise its discretion under Supreme Court Rule 10.1(a) and (c) and grant a writ of certiorari to review the decision below.

II.

Federal Court Decisions Conflict Over The Scope of Section 1983 And The Application Of *Roth* To Disappointed Bidder Lawsuits.

Respondents argue there is no conflict regarding the application of *Board of Regents v. Roth,* 408 U.S. 564 (1972), among the circuits because every court in disappointed bidder cases referenced state law in its decision. [See Respondents' Brief in Opposition, at 9-10.] A review of the full text of the cases cited in Georgia Power's Petition at pages 9 and 10 demonstrates, however, that several federal courts do not believe that *Roth* is applicable to the disappointed bidder and procurement situation. Due to conflict and confusion over the application of *Roth*, however, these courts wisely go on to rule alternatively that even if *Roth* applies, an entitlement nonetheless did not arise under the relevant state law. For example, the Seventh Circuit stated in *Coyne-Delany Co. v. Capital Development Board*, 616 F.2d 341, 343 (7th Cir. 1980) (emphasis added):

> The rational of *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), is, in our opinion, *inapplicable to the procurement situation;* but even if it were, plaintiff has failed to show either a property or a liberty interest entitled to procedural due process protection.

Further, in discussing the application of *Roth* to public contracts in general, the Second Circuit stated:

> Nevertheless, the doctrinal implications of constitutionalizing all public contract rights would raise substantial concerns, and we seriously doubt that *Roth* and its progeny portend such a result, although we do not reach the issue today. *An interest in enforcement of an ordinary commercial contract with a state is qualitatively different from the interests the Supreme Court has thus far viewed as "property" entitled to procedural due process protection.* . . . But we hesitate to extend the doctrine further to constitutionalize interests that are not associated with any cognizable status of the claimant beyond its temporary role as a governmental contractor.

S & D Maintenance Co. v. Goldin, 844 F.2d 962, 966 (2d Cir. 1988) (emphasis added). Recently, the Second Circuit also stated:

> While state law defines the underlying substantive interest, "federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9, 98 S.Ct. 1554, 1560, 56 L.Ed.2d 30 (1978) (quoting *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709). *In particular, not every contractual benefit rises to the level of a constitutionally protected property interest.*

Ezekwo v. NYC Health & Hospitals Corp., 940 F.2d 775, 782 (2d Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 657 (1991) (emphasis added); *see also Metric Constructors, Inc. v. Gwinnett County, Georgia*, 729 F. Supp. 101, 101 (N.D. Ga. 1990) (noting "widely conflicting authority

concerning the rights of a disappointed bidder to obtain judicial relief").

Moreover, the conflict and confusion in the courts extends beyond the application of *Roth* to the broader question of the proper scope of 42 U.S.C. § 1983. For example, in *Kasom v. City of Sterling Heights*, the district court ruled that "bidders have a *limited* property interest in not having the procedure, which regulates the enjoyment of the benefit sought, applied in an arbitrary or capricious manner." 600 F. Supp. 1555, 1559 (E.D. Mich. 1985) (emphasis in original). This ruling is in sharp contrast to the view held by the district court in *Blake v. Ambach*, which stated: "Section 1983 is not a means for litigating in a federal forum whether a state or local administrative decision was wrong or even whether it was arbitrary and capricious." 691 F. Supp. 651, 655 (S.D.N.Y. 1988) (citing *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 832 n.9 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982)). Further, even with respect to situations involving already acquired government contracts, several circuits have limited the application of *Roth* and the use of Section 1983 as a vehicle for obtaining judicial review in federal court of contract disputes a party has with a municipal or state government. *See, e.g., San Bernardino Physicians' Services Medical Group, Inc. v. County of San Bernardino*, 825 F.2d 1404, 1408 (9th Cir. 1987) ("It is neither workable nor within the intent of section 1983 to convert every breach of contract claim against a state into a federal claim."); *Costello v. Town of Fairfield*, 811 F.2d 782, 784 (2d Cir. 1987) ("A contract dispute, however, does not give rise to a cause of action under section 1983.").

Interestingly, the Eleventh Circuit did not cite any other circuit case dealing with frustrated bidders as support for its holding. The sampling of cases Georgia Power quoted above from the Second, Seventh, and Ninth

Circuits reveal the circuits are struggling with the application of *Roth*, and are seeking a framework for confining lawsuits by entities or individuals frustrated with their business interactions with their state or municipal governments.

III.

Certiorari Should Be Granted To Resolve Conflict And Confusion In The Lower Federal Courts Regarding The Application Of *Roth* To Disappointed Bidder Lawsuits.

Respondents claim that Georgia Power fails to accurately characterize what Respondents are seeking, arguing that what they claim is a property interest in the *award* of the utility contracts. [Respondents' Brief in Opposition, at 11 (emphasis in original).] Georgia Power contends that the award is inherently inchoate, and as such, a bidder does not know if it will receive the contract until the award is made. A bidder cannot form a legitimate expectation of receiving a state contract in Georgia for multiple reasons including, as Respondents admit, "Georgia competitive bidding provisions permit a state official to reject any and all bids." [Respondents' Brief in Opposition, at 12 n.5, citing O.C.G.A. § 50-5-67(b) (Michie Supp. 1992).]

By arguing that certiorari should not be granted to review the Eleventh Circuit's interpretation of Georgia law, Respondents sidestep the contention of Georgia Power that this case involves a fundamental question of whether *Roth* and its progeny are applicable in any instance to frustrated bidder claims. Thus, the primary legal issue in this appeal revolves around *Roth* and not Georgia law. *See, e.g., Ezekwo*, 940 F.2d at 782. Only if *Roth* is applicable to frustrated bidder claims is Georgia law at issue.

Certiorari, however, would be proper in this case even if Georgia law is at issue because of the Eleventh Circuit's unreasonable interpretation of Georgia law. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 n.9 (1985) (listing cases where "the Court has refused to follow the views of a lower federal court on an issue of state law"). The Eleventh Circuit's error of confusing state law that grants *standing* to obtain judicial review with law that grants substantive property rights is a significant error independently demanding this Court's review because the distinction between standing and property entitlement is fundamental to a proper application of Section 1983 under *Roth*.

In its opinion, the Eleventh Circuit did not discuss, much less cite *City of Atlanta v. J.A. Jones Construction Co.*, 260 Ga. 658, 398 S.E.2d 369 (1990), which is the latest treatment by the Supreme Court of Georgia of disappointed bidder suits. *J.A. Jones* identifies that under Georgia law, Respondents lack the property interest they claim. [See Petition, at 12 n.6.] Instead of looking to *J.A. Jones* for guidance, the Eleventh Circuit relied upon *Hilton Construction Co. v. Rockdale County Board of Education*, 245 Ga. 533, 266 S.E.2d 157 (1980), to support its ruling that Georgia recognized a property interest in the award of state contracts to state bidders. *See Pataula Electric Membership Corp. v. Whitworth*, 951 F.2d 1238, 1243 (11th Cir. 1992) [App. at 10a]. The Supreme Court of Georgia in *Hilton*, however, only addressed the question of whether a disappointed bidder had standing to sue the State Board of Education, applying the zone of interests test that was articulated in *Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). *Hilton*, 245 Ga. at 538, 266 S.E.2d at 161. The zone of interests test, however, determines only the potential class of plaintiffs. *See Clarke v. Securities Industry Association*, 479 U.S. 388, 399 (1987). The question of standing is a much different question than that of whether a person

has a property interest in doing business with the government. *See Bank of Jackson v. Cherry*, ____ F.2d ____, No. 91-3547, *slip op.* at 3231, 1992 U.S. App. LEXIS 16812 (11th Cir. July 27, 1992) (in distinguishing *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964), the court stated: "But *Freeman* held no more than that debarment works a sufficient economic injury on the plaintiff to confer standing. 334 F.2d at 574-75. It did not hold that the plaintiff in that case held a property interest in doing business with the government."). In *Hilton*, the Supreme Court of Georgia, although finding the plaintiff had standing to bring suit, made no determination as to whether the plaintiff had an interest in the contract sought in the nature of a property entitlement identified in *Roth*.

Respondents never acquired a Georgia property benefit to be deprived of, and therefore the Eleventh Circuit erred in employing *Roth* to involve itself and the United States Constitution in the dispute Respondents have with their state government. Moreover, once finding federal judicial review proper, the Eleventh Circuit again erred in its interpretation of Georgia law, reversing the district court. The court confused standing law with substantive property interest law and the Eleventh Circuit panel did not address the most recent pronouncement of the Supreme Court of Georgia dealing with disappointed bidder lawsuits.

IV.

The Fourteenth Amendment's Procedural Protection Of Property Is A Safeguard Of The Security Of Interests That A Person Has Already Acquired In Specific Benefits.

Respondents argue that this Court has not ruled that possession is required for the creation of a property interest. Georgia Power fully acknowledges that the Court has not addressed squarely the issue of possession.

[See Petition, at 10 n.5.] However, *Roth's* "already acquired" requirement and the property concept itself demonstrate that the Court has implicitly ruled possession is fundamental to the formation of a constitutionally protected property interest. *See* J. Nowak, R. Rotunda, & J.N. Young, *Constitutional Law*, 547 n.8 (2d ed. 1983) ("present enjoyment" concept is implied by statements of the Court) (hereinafter "Nowak, Rotunda & Young"). This case presents an excellent opportunity for the Court to address the issue of possession because it involves only the limited and precise legal question of whether possession is fundamental to the formation of a constitutionally protected property interest.

In response to Georgia Power's Petition, Respondents' attempt to deflect the Court's attention away from *Roth* and instead base their arguments on liberty interest cases, specifically *Board of Pardons v. Allen*, 482 U.S. 369 (1987) and *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979). [See Respondents' Brief in Opposition, at 14-15.] These cases, however, do not assist Respondents' claims. First, liberty interests are broader than property interests. *See Bank of Jackson v. Cherry, slip op.* at 3232. Second, *Pardons* is based on *Greenholtz*, and *Greenholtz* identifies that there is a difference in the status between applicants for benefits and those already receiving government benefits. *See Greenholtz*, 442 U.S. at 9-11. *See generally* Nowak, Rotunda & Young, at 538 ("Thus, the majority [in *Greenholtz*] distinguished its earlier application of due process principles to parole and probation revocations because those determinations involved termination, upon a finding of specific facts, of a state-granted, *presently enjoyed*, conditional liberty interest." (emphasis added)).

The case at bar turns upon *Roth*. In *Roth* the Court expanded the range of interests that could be considered "property", but these new property interests, such as drivers licenses, take on the protections afforded to estab-

lished types of property because they have the traditional indicia of property, particularly, possession. Indeed, as previously noted in Georgia Power's Petition at page 9, Justice O'Connor observed that the Court has "never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment." *Lyng v. Payne*, 476 U.S. 926, 942 (1986). In the case at bar, Respondents' claims lack the attributes of property.

V.

The Court Should Grant Certiorari To Review The Eleventh Circuit's Inauguration Of Substantive Due Process Rights To Disappointed Bidders.

In the Eleventh Circuit, Georgia Power argued that Respondents' interest in the award of a contract was inherently inchoate, and as such, could not form the basis of a *Roth* entitlement. Georgia Power emphasized that this was especially true in the case at bar because the State Defendants could reject any and all bids; consequently, no bidder could be sure that any bid would ever be accepted. Confronted with this argument, the Eleventh Circuit ruled "plaintiffs state a cognizable claim by alleging that defendants abused their discretion by arbitrarily ignoring competitive bidding requirements." *Pataula*, 951 F.2d at 1243 [App. at 11a.] It is the Eleventh Circuit opinion that Georgia Power is appealing. With this ruling, the Eleventh Circuit ignored this Court's guidance in the area of substantive due process analysis and created a further split among the circuits. [See Petition, at 17-20.]

CONCLUSION

The State Defendants' decision to select one Georgia electric utility over another Georgia utility to supply power to two prisons should not be a concern of the federal courts. The Eleventh Circuit erred in reversing the district court and in so doing, the Eleventh Circuit handed down a decision that flies in the face of this Court's precedents, conflicts with several other circuits, and although Georgia law is not at issue on this appeal, is an erroneous interpretation of Georgia law.

Respectfully submitted,

Ralph H. Greil
Counsel of Record
Robert P. Edwards, Jr.
Kevin C. Greene
Susan P. Wilkerson
Eric A. Szweda

TROUTMAN SANDERS
5200 NationsBank Plaza
600 Peachtree Street, N.E.
Atlanta, Georgia 30308-2216
(404) 885-3000

Counsel for Petitioner
Georgia Power Company

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